IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION NO.816 OF 1990

M.K. Unnikrishnan. ...Petitioner.
Vs.
Export Inspection Council of India & Ors. ...Respondents.
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Mr. Neel Helekar for the Petitioner.
Mr. Suresh Kumar for the Respondents.
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CORAM : DR.D.Y.CHANDRACHUD, J.

January 25, 2005.

ORAL JUDGMENT:

The Petitioner joined the services of the Second Respondent in 1966 and his last posting in Mumbai as an Additional Director commenced from June 1982. The Second Respondent is the export inspection agency which is subject to the control and supervision of the Export Inspection Council of India, the First Respondent. The First Respondent is a statutory body constituted under the provisions of the Export (Quality Control and

Inspection) Act, 1963. On 19th July 1986, a memorandum was issued to the Petitioner by the Director, in charge of Inspection and Quality Control of the First Respondent informing the Petitioner of the convening of disciplinary proceedings. The allegation against the Petitioner was that while functioning as an Additional Director in the Export Inspection Agency during July and August 1982, he had shown undue favour to an entity by the name of M/s.Khandelwal Tubes; that by his conduct he had failed to maintain absolute integrity and devotion to duty and that he had acted in a manner unbecoming of an Export Inspection Agency employee, thereby violating Rules 3(1)(i), 3(1)(ii), and 3(1)(iii) of the Central Civil Services (Conduct) Rules, 1964. In the statement of imputation, it was stated that the Ministry of Commerce of the Union Government had notified that Steel Tubes shall be subject to quality control and inspection prior to export. Khandelwal Tubes ("K.T.") is alleged to have submitted a notice of intimation dated 22nd July 1982 to the Export Inspection Agency, Mumbai for the issuance of a certificate of inspection under the Act in respect of Mild Steel Galvanised Welded Pipes. The f. o. b. value of the

consignment was declared at Rs.16,63,142/- and the pipes were declared in the invoice to be in conformity with the British Standards. Another notice of intimation dated 26th July 1982 was furnished by the same party in respect of another consignment of the value of Rs.11,78,615/-. An inspection was carried out at Nagpur by the Assistant Director (Engineering), Export Inspection Agency, Mumbai, one Shri R.N. Das, who declared the consignment as export-worthy in his report. The second consignment was also declared as satisfactory and a test certificate was submitted to the Agency at Mumbai for further action. According to the Statement of Imputation, the consignments should not have been declared as export-worthy since they did not conform to the British Standards. Though the tolerance level stipulated in the export contract was different from the British Standards, it was alleged that the contractual specifications required the approval of the Competent Authority. Moreover, it was alleged that the contractual specifications did not provide for any deviation in the marking of colour bands on the tubes. It was then alleged that the value of the two consignments

was above Rs.5 lakhs, and the Additional Director was not empowered to allow deviations which should have been routed through the Ministry of Commerce to the Director (Inspection & Quality Control), Export Inspection Council. Instead, it is alleged that the Petitioner approved two notes put up before him by the Deputy Director and the Additional Joint Director proposing that a deviation in respect of the consignments may be allowed. Though the tolerance of the length of the tubes was alleged to meet the buyer's requirements, it is alleged that the buyer had not accepted deviation in colour.

2. The enquiry was conducted by Shri M. K. Dixit, Commissioner, Departmental Inquiries who was deputed by the Central Vigilance Commission. In the course of the disciplinary proceedings, the Enquiry Officer submitted his report dated 10th June 1987. The Inquiring Authority held that the charges against the Petitioner were not proved. The Central Vigilance Commission by an Office memorandum dated 30th November 1987 forwarded its comments to the Export Inspection Council of India, the First

Respondent. The office memorandum inter alia dealt with the role of several officers including the Petitioner. The view of the Central Vigilance Commission was that the culpability of the Petitioner was established and the Commission hence disagreed with the observations of the Inquiring Officer. On 30th June 1988, the Chairman of the First Respondent passed an order holding that on 'careful consideration' of the enquiry report and the records of enquiry, he did not agree with the findings of the Enquiry Officer on three grounds to which a reference would be made shortly hereinafter. Accordingly, in exercise of the powers conferred by Rule 9(1) of the Export Inspection Agency Employees (Classification, Control and Appeal) Rules, 1978 applicable to the First Respondent, a penalty of compulsory retirement was imposed on the Petitioner. The Petitioner filed an appeal to the Appellate Authority in the Government of India which was rejected on 17th May 1989.

3. This petition was instituted on 6th March 1990. The Petition was dismissed by a Learned Single Judge of this Court by

an order dated 12th June 1990 on the ground of latches. The Single Judge held while that the Appellate Authority upheld the order of the Disciplinary Authority on 17th May 1989, the Petition has been filed on 30th January 1990 after the Petitioner had obtained his Provident Fund, gratuity and other pensionary benefits. The Petitioner challenged the order of the Single Judge in appeal and by an order dated 3rd September 1990, a Division Bench consisting of Mr.Justice S.P. Bharucha and Mr.Justice B. N. Srikrishna (as the Learned Judges then were) allowed the appeal and restored the petition for hearing on merits. The Division Bench noted that the Chairman of the First Respondent had rejected the report of the Enquiry Officer in view of the finding of the Central Vigilance Commission and held that the charge against the Petitioner had been proved. A copy of the Enquiry Officer's report was served on the Petitioner for the first time together with the order of compulsory retirement. Thought the Petitioner had sought an opportunity of a hearing in the appeal, the appeal was dismissed on 17th May 1989 without a personal hearing. The Division Bench held that the delay of six months between the order

of the Appellate Authority and the institution of the petition was not delay of a nature as should result in the dismissal of the Petition on the ground of latches. Though the Petitioner had received his Provident Fund, gratuity and pensionary benefits, he had not concealed it in his Writ Petition. The Division Bench held that having regard to the fact that the report of the Enquiry Officer was overturned by the disciplinary authority, and having regard to the observations thereon of the Central Vigilance Commission, the Petition required admission and further consideration. Rule was accordingly granted on the petition and the petition was directed to be heard.

4. In assailing the order of the disciplinary authority, Counsel appearing on behalf of the Petitioner submitted that (i) ex-facie the order of the disciplinary authority shows that it is based exclusively on the advice of the Central Vigilance Commission; the language used in the Office Memorandum of the Central Vigilance Commission has been lifted verbatim and there was no independent application of mind and (ii) The disciplinary authority

proceeded to issue an order of compulsory retirement and disagreed with the report of the Enquiry Officer without furnishing to the petitioner, a copy of the report; of the reasons for the proposed disagreement and without allowing to the Petitioner an opportunity of submitting his representation there against. This, it was urged, was sufficient to vitiate the order of the disciplinary authority in view of the law laid down by the Supreme Court in **Nagraj Shivarao Karjagi vs. Syndicate Bank,** (1991) 3 SCC 219 and **Punjab National Bank vs. Kunj Behari Misra,** (1998) 7 SCC 84.

5. The record of this case is sufficient, in my view, to substantiate the first grievance of the Petitioner which is that the disciplinary authority has blindly accepted the view of the Central Vigilance Commission. The Inquiring Officer submitted his report on 10th June 1987 holding that the charges were not proved. An Office Memorandum was issued by the Director of the Central Vigilance Commission on 30th November 1987. A comparison of the order of the disciplinary authority dated 30th June 1988 with the

advice of the Central Vigilance Commission would indicate that the order of the disciplinary authority is almost a reproduction verbatim of the contents of the Office Memorandum of the Central Vigilance Commission. In order to elucidate this position, it would be only appropriate to compare the finding of the disciplinary authority with the advice contained in the Office Memorandum of the Central Vigilance Commission.

Finding of the disciplinary authority	Office Memorandum of CVC

(i) It has been established beyond doubt that the consignments had deviations in length and colour marking. The Inquiry Officer (IO) had observed in his report that the deviations in length had been established. Regarding deviations in colour, the IO observed that as the marking on the steel tubes was as per Indian standards, it cannot be considered as a deviation. This contention cannot be accepted as there was no mention in the notice of intimation that the colour marking of the tubes should be as per Indian standards. On the other hand, it was mentioned in the notice of intimation that the specifications should conformation to BS: 1387 of 1967. The invoice submitted by the exporter to EIA also makes it clear that description of the material indicated conformation to BS:1387 of 1967. There was no mention of Indian standards. The I.O.' sobservation that there was no deviation in respect of colour marking is not, therefore, acceptable.	(i) As already has been indicated above, it was established beyond doubt that the consignments were having deviations in tolerance and colour marking. The IO observed at p.5 that the deviation in length was established. Regarding deviation in colour, that IO observed that as the marking on the steel tubes was as per Indian Standards, it cannot be considered as a deviation. IO' scontention cannot be accepted as there was no mention in the notice of intimation that the colour marking should be as per Indian Standard whereas it was mentioned that the specification should conform to BS-1387.67. A close scrutiny of Ex.3-5 i.e. The invoice, makes it clear that the description of the material indicated confirmation to BS-1397-67. There was not mention of the Indian Standards. Although it is a fact that as per Ex.S-2 i.e. The Notification of the Govt of India, it has been indicated that the Steel tubes may conform to the Indian Specifications or the specifications by International Standards orgn. Etc. yet it cannot be interpreted that part of the specification will be as per British Standards and the rest of it will as per Indian Standards. The I.O's observation that there was no deviation in respect of colour is not acceptable.

(ii) There was no buyer's acceptance and advice as required under Ex.S-11. No document was produced in the inquiry to support confirmation from the buyer accepting the deviations in colour marking. The exporter' sletter and telex cannot be taken as authentic to read the buyer's mind. It has been established that the confirmation of the buyer was never obtained by Shri Unnikrishnan before allowing the consignment for export.	(ii) There was no buyer's acceptance and advice produced before the inquiry which is a confirmation from the buyer accepting the deviations. The exporter' s letter or telex cannot be taken as authentic to read the buyer' s mind. It is established the the confirmation from the buyer was never obtained by the CO before allowing the consignment to be exported.

(iii) The matter remains that Shri Unnikrishnan himself was the senior most member of the Committee set up by him. Besides, while it is on record that the exporter, met Shri Unnikrishnan personally, there is nothing on record as to what transpired in the meeting between Shri Unnikrishnan and the exporter except that it was agreed to accept the requirements of the exporter. Shri Unnikrishnan was aware of the limitations of his financial power so far as the acceptance of deviations is concerned. He did not inquire about the reasons for splinting of the consignments. Moreover, the consignments were splitted up in such a manner that each of these was kept within the limit of the power of the Addl. Director. This evidence establishes a strong probility that the splitting was done purposefully. It is established that Shri Unnikrishnan in collusion with his officers – S/Shri S. C. Goyal, then Addl. Joint Director and R. K. Shivdasani, then Dy. Director in EIA-Bombay has displayed undue favour to the party.	(iii)Whatever may be the argument of the CO regarding formation of a Committee to examine the deviations (discussed in the IO report at pages 12 & 13) the matter remains that the CO himself was a Member of the Committee. Besides, it has already been indicated in Ex.S-12 that the exporter met the CO personally. It is not on record as to what transpired in the meeting between the CO and the exporter except that it was agreed to accept the requirements of the exporter as the CO also signed below that note of the Addl. Jt. Director, Shri Goyal. This is proved beyond doubt that before the case was examined by a Committee, the CO decided to allow the consignments for export. The CO was aware of the limitations of his financial powers, so far as the acceptance of deviations is concerned. Before agreeing to the so called request of the party for splitting up of the consignments, the CO did not enquire about the reasons for such splitting. Moreover, the consignments were split up in such a manner that each of these is kept within a limit of the

is	probability that the splitting was done purposely. From the above,it established that the CO (in collusion with the other three officers) displayed undue favour to the party. The Commission would therefore advise non-acceptance of the IO's report and imposition of a major penalty on Shri Unnikrishnan also.

6. A comparison of the two clearly demonstrates that all that the Chairman of the First Respondent has done is, to baldly follow the advice of the Central Vigilance Commission by incorporating that advice as his finding as disciplinary authority. There was no independent application of mind. In **Nagraj Shivarao Karajagi vs. Syndicate Bank,** (1991) 3 SCC 219, in a similar case, the Supreme Court held that the advice tendered by the Central Vigilance Commission was not binding on the Bank in that case or the punishing authority. It was not obligatory upon the punishing authority to accept the advice of the Central Vigilance Commission and the power of punishing authorities in departmental proceedings is regulated by statutory regulations.

The judicial discretion which was conferred upon the disciplinary authority had to be exercised having regard to the facts and circumstances of each case and no third party like the Central Vigilance Commission or the Central Government could dictate to the disciplinary authority or to the appellate authority as to how the power should be exercised and what punishment should be imposed on the delinquent officer. In view of the judgment of the Supreme Court, the first submission that has been urged on behalf of the Petitioner has to be accepted. The order of the Disciplinary authority is ex facie, a reproduction of the advice in the office Memorandum of the Central Vigilance Commission. The Disciplinary authority abdicated its discretion. There was no independent consideration of the material.

7. In so far as the second submission is concerned, there is equally, in my view, merit in the grievance of the Petitioner. The Enquiry Officer found that none of the charges against the Petitioner had been established in the course of the disciplinary proceedings. If the Chairman of the First Respondent as the

disciplinary authority proposed to differ with those findings, the principles of natural justice required that a copy of the report should be submitted to the Petitioner and the reasons for the proposed disagreement be made known to the Petitioner in order to enable him to have an opportunity of making his submissions thereon. This was admittedly not done. The position in law in so far as this aspect of the matter is concerned, is settled by the decision of three Learned Judges of the Supreme Court in **Punjab National Bank vs. Kunj Bihari Misra,** (1998) 7 SCC 84. Mr.Justice B. N. Kirpal (as the Learned Chief Justice then was) speaking for the Bench, adverted to the earlier decision of the Court including the decision of the Constitutional Bench in **Managing Director ECIL v. B.Karunakar,** (1993) 4 SCC 727 and held thus:

> "The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such

> conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority."

The same view was followed in **State Bank of India vs. Arvind K.Shukla**, AIR 2001 SC 2398 by a Bench of two Learned Judges. In view of the settled position in law, the second submission urged on behalf of the Petitioners is equally worthy of acceptance. The Petitioner has been condemned unheard. As the Division Bench noted in its order dated 3rd September 1990, a copy of the report of the Enquiry Officer was served on the Petitioner for the first time when the order of punishment was served upon him. The Petitioner was furnished no opportunity to make his representation, if any, against the action which was proposed by the disciplinary authority while differing with the report of the Enquiry Officer. The order of compulsory retirement was passed against the Petitioner without affording an opportunity of being heard to him even though the Enquiry Officer had come to the conclusion that the charges against the Petitioner had not been proved. There was, in these

circumstances, a manifest failure to comply with the principles of natural justice which in the present case is a matter of serious prejudice to the Petitioner leading to a palpable miscarriage of justice.

8. Ordinarily, it would have been appropriate to remit the matter back to the disciplinary authority and to direct the disciplinary authority to take a fresh and independent decision on the facts of this case after furnishing the Petitioner an opportunity consistent with the principles of natural justice. However, the Petitioner attained the age of superannuation on 30th April 1990. Nearly 15 years have since elapsed and it would not in my opinion, now be either appropriate or proper to subject the Petitioner to the torment of a continuation of the disciplinary proceeding. The Petitioner is over 74 years of age. In Punjab National Bank (supra), the High Court had accepted the contention of the employee that the disciplinary authority could not have chosen to disagree with the conclusion of the Enquiry Officer without affording the employee an opportunity of being heard. The

High Court quashed and set aside the order imposing penalty of recovering damages for the loss alleged to have been caused to the Bank due to the negligence on the part of the employee and directed the appellant Bank to release the retirement benefits including provident fund and gratuity. The Supreme Court affirmed the decision of the High Court holding that the superannuation had taken place on 31st December 1983. One of the employees had expired during the pendency of the proceedings and over 14 years had elapsed since the date of superannuation. The Supreme Court, therefore, held that it would not be in the interests of justice that, at that stage, the case should be remanded to the disciplinary authority for the start of another innings. This applies to the facts of the present case as well. Counsel appearing on behalf of the Petitioner submitted that it would be appropriate for this Court to direct the Respondent to release the salary that was payable to the Petitioner between the date of the order of the disciplinary authority (30th June 1988) and the date of superannuation (30th April 1990) and to direct the Respondent to grant to the Petitioners the difference in the terminal benefits. Taking all the facts and

circumstances of the present case into consideration and having regard to the fact that I am not inclined to now remand the matter back to the disciplinary authority, I am of the view that the ends of justice would be met if the direction to the Respondents is confined to the grant of terminal benefits. The Petitioner received his provident fund and gratuity. The pensionary payments that have been made to the Petitioner should be recomputed by taking the date of superannuation of the Petitioner as 30th April 1990 as the notional date for the purposes of the computation. The pensionary and other terminal benefits should be computed on the aforesaid basis and the Petitioner would be entitled to the difference in terminal benefits including pension and gratuity on the basis that he attained the age of superannuation on 30th April 1990. However, it is clarified that the Petitioner will not be entitled to the payment of salary between 30th June 1988 and 30th April 1990. The differential benefits that are due and payable to the Petitioner shall be released to him within a period of 12 weeks from today. No recovery shall be made on account of the pension, if any, that has been paid to the petitioner from the order of the

disciplinary authority on 30th June 1988 until his superannuation on 30th April 1990. The Petition shall accordingly stand allowed in the aforesaid terms. In the facts and circumstances of the case, there shall be no order as to costs.

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